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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

MAXIMILIAN KLEIN, et al.,
Plaintiffs,
vs.
FACEBOOK, INC.,
Defendant

Consolidated Case No. 5:20-cv-08570-LHK

THIRD JOINT CASE MANAGEMENT STATEMENT

The Hon. Lucy H. Koh

Hearing Date: September 1, 2021 at 2:00 p.m.

This Document Relates To: All Actions

THIRD JOINT CASE MANAGEMENT STATEMENT

2 In advance of the September 1, 2021 Case Management Conference, counsel for the putative
3 Consumer and Advertiser Classes and defendant Facebook, Inc. respectfully submit this Third Joint
4 Case Management Statement. This Case Management Statement updates the Court as to recent
5 developments on pertinent matters.

1. Jurisdiction and Service

Plaintiffs' Position:

8 The Court has (and Facebook has not disputed) subject matter jurisdiction over these
9 consolidated actions pursuant to 28 U.S.C. §§ 1331, 1332, 1337(a), 1367, and 15 U.S.C. §§ 15, 26.
10 As Plaintiffs indicated in the June 30, 2021 Joint Case Management Statement, should Facebook
11 file any motion to compel arbitration, Plaintiffs reserve all rights to oppose that motion.

Facebook's Position:

13 As Facebook explained in the June 30, 2021 Joint Case Management Statement, certain
14 Plaintiffs had raised the issue of arbitrability of Plaintiffs' claims, and Facebook would assess the
15 issue and raise it with the Court as appropriate once the Consolidated Amended Complaints
16 ("CACs") were filed. *See* Dkt. No. 114 at 4. Facebook continues to reserve all rights and defenses
17 with respect to unnamed members of the putative classes alleged in the CACs, including but not
18 limited to its right to move to compel arbitration of any unnamed putative class members' claims
19 subject to an arbitration provision at the appropriate time or to oppose class certification on this
20 basis. *See, e.g., Gutierrez v. Wells Fargo Bank, NA*, 889 F.3d 1230 (11th Cir. 2018); *Rushing v.*
21 *Williams-Sonoma, Inc.*, 2020 WL 6787135 (N.D. Cal. Oct. 8, 2020); *In re TFT-LCD (Flat Panel)*
22 *Antitrust Litig.*, 2011 WL 1753784 (N.D. Cal. May 9, 2011); *Lozano v. AT&T Wireless Servs., Inc.*,
23 504 F.3d 718 (9th Cir. 2007).

2. Motions

a. Pending Motions

26 *Motion to Dismiss:* On May 20, 2021, Facebook filed a motion to dismiss the CACs. See
27 Dkt. No. 97. On June 17, 2021, Plaintiffs filed an opposition to Facebook’s motion to dismiss. See
28 Dkt. No. 109. On July 5, 2021, Plaintiffs filed a Supplemental Brief Regarding Government Orders.

1 *See* Dkt. No. 116. Facebook filed its reply to Plaintiffs' opposition on July 7, 2021. *See* Dkt. No.
 2 117. The Court heard arguments on Facebook's motion to dismiss on July 15, 2021.

3 *Motion to Remand:* Facebook removed *Rosenman v. Facebook, Inc.* to the Northern District
 4 on March 25, 2021. No. 21-cv-02108 (N.D. Cal.) ("Rosenman"), Dkt. No. 1. On April 9, 2021, the
 5 Court related *Rosenman* to these consolidated actions. *Rosenman*, Dkt. No. 14. The *Rosenman*
 6 plaintiff filed a motion to remand on April 26, 2021, and briefing on that motion has since closed.
 7 *Rosenman*, Dkt. Nos. 17, 20, 21. The matter will be decided on the papers. *Rosenman*, Dkt. No.
 8 25.

9 *Motion to Relate:* The amended complaint in *Loveland v. Facebook, Inc.*, No. 21-CV-
 10 03300-CRB, Dkt. No. 42, alleges antitrust violations which appear to be largely copied from those
 11 advanced in the CACs. On August 18, 2021, Facebook and the *Loveland* Plaintiffs jointly moved
 12 to relate the *Loveland* case to these actions. Dkt. No. 131. Plaintiffs take no position on the motion.

13 **b. Anticipated Motions**

14 In addition to the specific motions below, the parties also anticipate that there will be further
 15 motions, including motions to exclude expert testimony and motions in limine.

16 **Plaintiffs' Anticipated Motions:**

17 *Motion for Class Certification:* Consistent with the Court's July 1, 2021 Case Management
 18 Order, Dkt. No. 115 at 2 ("July CMO"), Plaintiffs intend to move for class certification by March
 19 15, 2022.

20 *Responses to Motions filed by Facebook:* Plaintiffs reserve all rights and arguments to
 21 respond to, or oppose, any future motions filed by Facebook. Should Facebook file any motion to
 22 compel arbitration, Plaintiffs reserve all rights to oppose that motion. Consistent with the Court's
 23 case management orders, Dkts. 82, 115, Plaintiffs will, by December 9, 2022, oppose any motion
 24 for summary judgment filed by Facebook.

25 **Facebook's Anticipated Motions:**

26 *Motion to Compel Arbitration:* Facebook reserves all rights and defenses with respect to
 27 unnamed members of the putative classes alleged in the CACs, including but not limited to its right
 28 to move to compel arbitration of any unnamed putative class members' claims subject to an

1 arbitration provision at the appropriate time. *See, e.g., Gutierrez*, 889 F.3d 1230; *Rushing*, 2020
 2 WL 6787135; *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 1753784.

3 *Motion for Summary Judgment:* In the event that this case survives the motion to dismiss,
 4 Facebook anticipates moving for summary judgment pursuant to Fed. R. Civ. P. 56.

5 *Responses to Motions filed by Plaintiffs:* Facebook reserves all rights and arguments to
 6 respond to, or oppose, any future motions filed by Plaintiffs, including Plaintiffs' motions for class
 7 certification.

8 **3. Amendment of Pleadings**

9 Pursuant to the Court's scheduling order, Dkt. No. 82, the Consumer Plaintiffs and the
 10 Advertiser Plaintiffs filed their respective consolidated class action complaints on April 22, 2021.
 11 Dkt. Nos. 86, 87.

12 Pursuant to the July CMO, the last day to further amend pleadings or add parties is August
 13 27, 2021. Dkt. No. 115.

14 **4. Discovery Updates**

15 **a. Facebook's Production of Documents Produced to Public Regulators**

16 The Court's April 2, 2021 Case Management Order required Facebook to produce to
 17 Plaintiffs, within 30 days, "the documents Facebook produced to the Federal Trade Commission
 18 and the United States House of Representatives" in connection with those entities' parallel antitrust
 19 investigations into Facebook. Dkt. No. 82 at 1. On May 3, 2021, Facebook produced those
 20 documents to Plaintiffs, and Plaintiffs' review of that production is currently ongoing.

21 **b. Stipulated Protective and 502(d) Orders**

22 The parties agreed to, and Judge DeMarchi entered (with modifications), an interim
 23 Protective Order and 502(d) Agreement to facilitate Facebook's May 3, 2021 production. Dkt. Nos.
 24 89–92. On May 14, 2021, the parties submitted, via joint letter briefs to Judge DeMarchi, their
 25 disputes on the Protective Order and 502(d) Agreement. Dkt. Nos. 94, 95. Judge DeMarchi issued
 26 orders on the proposed 502(d) Agreement and Protective Order on June 3, 2021, Dkt. No. 105, and
 27 June 14, 2021, Dkt. No. 108, respectively. The parties submitted a revised 502(d) Agreement and
 28 Protective Order on June 11, 2021, and June 18, 2021, respectively. Dkt. Nos. 106, 110. Judge

1 DeMarchi entered these orders on June 14, 2021, and June 21, 2021, respectively. Dkt. Nos. 107,
 2 111.

3 **c. ESI, Privilege, Deposition, and Expert Protocols**

4 As discussed in the parties' Rule 26(f) Report, the parties have met and conferred regarding
 5 ESI, privilege, deposition, and expert protocols. Dkt No. 130 at 4–5. The parties submitted joint
 6 stipulated orders (to the extent the parties agree on particular provisions), as well as joint letter briefs
 7 addressing the remaining disputes relating to those protocols, to Judge DeMarchi on August 20,
 8 2021. *See* Dkt. Nos. 132–35. Judge DeMarchi set a hearing on the parties' disputes for August 31,
 9 2021. Dkt. No. 136.

10 **d. Limitations on Interrogatories**

11 The parties dispute limitations on interrogatories and set out their positions in the Rule 26(f)
 12 Report. Dkt. No. 130 at 5–8.

13 **e. Initial Disclosures**

14 The parties exchanged Rule 26(a) initial disclosures on August 13, 2021.

15 The parties dispute whether Plaintiffs' initial disclosures satisfy Fed. R. Civ. P.
 16 26(a)(1)(A)(iii).

17 **Facebook's Position:** User Plaintiffs and Advertiser Plaintiffs' initial disclosures do not
 18 satisfy Fed. R. Civ. P. 26(a)(1)(A)(iii) because they fail to make an informed, good faith
 19 **computation** of each (or any) category of damages they claim, and Advertiser Plaintiffs' initial
 20 disclosures do not satisfy Fed. R. Civ. P. 26(a)(1)(A)(i)'s requirement that a party identify not only
 21 the individuals who have information that the disclosing party may use to support its claims and
 22 defenses, but also the "subjects of that information." Facebook timely raised these issues with both
 23 User Plaintiffs and Advertiser Plaintiffs less than a week after they were served, and requested a
 24 prompt turnaround time for compliant disclosures, because of their significance to the case and
 25 importance to keeping the case on its current schedule. User Plaintiffs responded by providing
 26 Facebook with amended initial disclosures, which did not address these deficiencies. Advertiser
 27 Plaintiffs responded by stating that they would provide Facebook with amended initial disclosures
 28

1 by August 27, 2021—after the filing of this joint case management statement. This issue is therefore
 2 not “moot.”

3 First, both User and Advertiser Plaintiffs’ initial disclosures still do not comply with Fed. R.
 4 Civ. P. 26(a)(1)(A)(iii) which requires, even at this stage of the litigation, the parties to make an
 5 informed, good-faith computation of each category of damages they claim. *See, e.g., Quidel Corp.*
 6 *v. Siemens Med. Sols. USA, Inc.*, 2020 WL 4747724, at *6 (S.D. Cal. Aug. 17, 2020) (a plaintiff’s
 7 computation of damages “should provide sufficient detail to enable the defendants to understand the
 8 contours of their potential exposure and make informed decisions regarding settlement and
 9 discovery,” and the plaintiff “must also timely disclose its theory of damages as well as the
 10 computation of those damages” and “should disclose the basic method or formula by which it
 11 contends its damages should or will be calculated even if it cannot identify the specific dollar amount
 12 of damages pending further discovery”); *City & Cty. of S.F. v. Tutor-Saliba Corp.*, 218 F.R.D. 219,
 13 221 (N.D. Cal. 2003) (“[T]he ‘computation’ of damages required by Rule 26(a)(1)(C) contemplates
 14 some analysis.”); *Agena v. Cleaver-Brooks, Inc.*, 2020 WL 6888725, at *2-3 (D. Haw. July 31,
 15 2020) (requiring supplemental disclosure where damages disclosure “fail[ed] to include any
 16 ‘computation of each category of damages claimed’”); *Nathan Bell v. Nusil Tech. LLC*, 2020 WL
 17 5371318, at *3-4 (E.D. Cal. Sept. 8, 2020) (requiring plaintiff to provide a calculation of damages
 18 for each cause of action); *cf. Cardoza v. Bloomin’ Brands, Inc.*, 2015 WL 3875916, at *2 (D. Nev.
 19 June 22, 2015) (“the word ‘computation’ contemplates some analysis beyond merely setting forth a
 20 lump sum amount for a claimed element of damages”). This Rule also requires the party to “make
 21 available … the documents or other evidentiary material … on which each computation is based,
 22 including materials bearing on the nature and extent of injuries suffered.” Fed. R. Civ. P.
 23 26(a)(1)(A)(iii).

24 In their original initial disclosures, User Plaintiffs’ damages “computation” merely recited
 25 the relief sought in their Complaint—refusing to specify the amount, method, or formula on which
 26 User Plaintiffs intend to rely for a quantification of damages incurred. The only information User
 27 Plaintiffs provided was that they “will likely require expert analysis and testimony.” That was
 28 clearly insufficient. *See Hill v. Alpine Sheriff Dep’t*, 2019 WL 5394524, at *3 (S.D. Cal. Oct. 22,

1 2019) (merely “referencing the complaint … undermines the very purpose of providing initial
 2 disclosures,” particularly where the complaint “is completely devoid of any specific computation of
 3 damages and … Defendants have no way of guessing what Plaintiff’s computation of each category
 4 of damages sought is”). User Plaintiffs’ amended initial disclosures state that the putative class—
 5 which, of course, has not yet been certified—has “tens of billions of dollars” in damages, but does
 6 not provide any *computation* of those damages, let alone any documents or other evidentiary
 7 material on which that *computation* is based. Furthermore, there is no computation for any damages
 8 from the named plaintiffs—information Plaintiffs should have but do not disclose. *Agena*, 2020
 9 WL 6888725, at *2-3 (finding disclosure deficient because it “did not provide a computation of
 10 damages for each plaintiff”).

11 User Plaintiffs’ reliance on *Focal Point Films, LLC v. Sandhu* is misplaced. 2020 WL
 12 5760355, at *3 (N.D. Cal. Sept. 28, 2020). There, the counterclaim plaintiff expressly stated that
 13 damages were not ascertainable at the time she made her initial disclosures and made clear the
 14 specific discovery she needed to ascertain damages. *Id.* Further, the holding in *Sandhu* can also be
 15 easily distinguished—there the court addressed whether to impose a severe sanction; the court was
 16 not evaluating whether counterclaim plaintiff’s disclosure was adequate at the time it was made.
 17 *Id.*¹

18 User Plaintiffs also seem to believe that their unprecedented damages theory, which lacks
 19 support, is excused from the requirements of the Rule. But there is no exception in Rule 26 for
 20 dubious damages claims. User Plaintiffs must do what the Rules require. Advertiser Plaintiffs’
 21 damages “computation” admits that they “have not yet determined the full amount of compensatory
 22 damages”—which is no computation at all. Plaintiffs are not excused from making the appropriate
 23 damages disclosures because they have not fully investigated their case. The entire purpose of Rule
 24 26(a)(1)(A)(iii) “is to ensure that defendants receive a preliminary damages estimate at the outset
 25 of litigation—before discovery has commenced.” *Holland Am. Line, N.V. v. Orient Denizcilik*
 26

27 ¹ To the extent *Focal Point Films* can be read to excuse the requirement to provide some
 28 analysis or computation of damages, respectfully, it would be wrongly decided. *See, e.g., Agena*,
 2020 WL 6888725, at *2-3.

1 *Turizm Sanayi Ve Ticaret, A.S.*, 2020 WL 1689736, at *2 (W.D. Wash. Apr. 7, 2020). Surely
 2 Plaintiffs must know if they suffered damages and, if so, how much damage they suffered. Users'
 3 own suggestion that they have complied with the Rules—suggesting that it was adequate for them
 4 to simply multiply “tens to hundreds” of dollars per user by an unspecified number = “tens” of
 5 billions of dollars—only serves to illustrate the inadequacy of their disclosures and of their theory
 6 of injury.

7 Second, the Advertiser Plaintiffs’ disclosures are additionally deficient because they do not
 8 comply with Rule 26(a)(1)(A)(i)’s requirement that a party identify not only the individuals who
 9 have information that the disclosing party may use to support its claims and defenses, but also the
 10 “subjects of that information.” This requirement is meaningful to “assist other parties in deciding
 11 which depositions will actually be needed.” Advisory Committee Notes to 1993 Amendments to
 12 Rule 26(a). Advertiser Plaintiffs made only a blanket statement that the disclosed individuals might
 13 have “[i]nformation relating to allegations in the CAC.” This falls well short of what the Rule
 14 requires because there is no way to discern from Advertiser Plaintiffs’ disclosures what information
 15 their witnesses may have, and thus who to depose, thereby “depriv[ing] [Facebook] the ability to
 16 pursue relevant evidence.” *See Ramirez v. Zimmerman*, 2019 WL 527462, at *8-9 (S.D. Cal. Feb.
 17 8, 2019).

18 Plaintiffs’ refusal to serve compliant initial disclosures threatens the viability of the case
 19 schedule set forth by the Court, by inhibiting Facebook’s ability to proceed with nonparty discovery
 20 and targeted discovery of the named Plaintiffs. *Ketab Corp. v. Mesriani Law Grp.*, 2016 WL
 21 5921767, at *2 (C.D. Cal. Mar. 18, 2016). Advertiser Plaintiffs’ argument to the contrary—that
 22 Facebook was able to serve an initial set of requests for production on the named Plaintiffs—is
 23 irrelevant, as Facebook remains unable to proceed with *targeted* discovery focused on the Plaintiffs’
 24 damages theory. And tellingly, Plaintiffs have no answer for the delays their noncompliant
 25 disclosures have caused with respect to nonparty discovery, which Facebook has not yet served.² .
 26

27 ² Advertiser Plaintiffs’ lament that Facebook only gave them four days to cure their deficient
 28 disclosures ignores that Advertiser Plaintiffs had **nine months** after filing their complaint to draft
 compliant disclosures in the first place.

1 Facebook anticipates moving to compel these required disclosures or to exclude Plaintiffs
 2 from presenting certain evidence. *See, e.g., Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d
 3 1101, 1106 (9th Cir. 2001) (“Rule 37(c)(1) gives teeth to these requirements by forbidding the use
 4 at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed.”).

5 **Consumer Plaintiffs’ Position:** Consumer Plaintiffs served initial disclosures on Facebook
 6 on August 13, 2021. On the afternoon of Friday, August 20, 2021, as the parties were finalizing
 7 their various joint discovery letter briefs and after Plaintiffs had submitted their proposed inserts for
 8 this Joint Case Management Statement (per Facebook’s requested schedule), Facebook, for the first
 9 time, notified Consumer Plaintiffs of its position that Consumer Plaintiffs’ “initial damages
 10 disclosures are deficient[.]” Facebook demanded a response by Tuesday, August 24, 2021.

11 Facebook’s claim is belied by its own repeated acknowledgments (as early as March) that it
 12 understands (but disputes the merits of) Consumer Plaintiffs’ damages theory. *See, e.g.,* Dkt. 78 at
 13 8, 36. Facebook’s position that initial disclosures require a full-blown damages calculation (akin to
 14 an expert report on damages, but before expert discovery has taken place) is also contrary to the
 15 law. *See, e.g., Focal Point Films, LLC v. Sandhu*, No. 19-cv-02898-JCS, 2020 WL 5760355, at *3
 16 (N.D. Cal. Sept. 28, 2020) (“Given the early stage of the case,” initial disclosure which identified
 17 type of damages sought and that precise calculation “may require expert testimony and discovery”
 18 was “sufficient at the time it was made to meet [party’s] obligations under Rule 26.”) (Spero, J.).

19 Although Consumer Plaintiffs disagree with Facebook’s characterization of Consumer
 20 Plaintiffs’ initial disclosures, Consumer Plaintiffs served amended initial disclosures on Facebook
 21 on August 24, 2021, in the hopes of avoiding an unnecessary dispute. Contrary to Facebook’s
 22 mischaracterizations, Consumer Plaintiffs’ amended initial disclosures more than provide an
 23 “explanation for the basis for” Consumer Plaintiffs’ estimate that the Consumer Class has suffered,
 24 at least, tens of billions of dollars in damages. Calculating Consumer Plaintiffs’ preliminary
 25 estimate of, at least, tens of billions of dollars (before trebling, interest, costs, and reasonable
 26 attorneys’ fees) merely requires multiplying an estimated number of class members (hundreds of
 27 millions), by an estimate of per-member damages (tens to hundreds of dollars each year), by the
 28 number of years in the class period (2007 to the present). All of this information is provided in

1 Consumer Plaintiffs' amended initial disclosures. Those amended initial disclosures also identify
 2 public sources of information supporting each of these estimated figures, including: "Facebook
 3 presentations detailing the number of daily and monthly active Facebook user accounts" (which
 4 supports an estimated number of class members) and "public news reports indicating that Facebook
 5 has, itself, calculated a market price at which to pay users," based on its "compensating 'Facebook
 6 Research App' users at least \$20.00 per month for their data" (which is an estimate of per-member
 7 damages, given that Facebook did not pay Consumer Class members at all for their data).

8 Consumer Plaintiffs' amended disclosures also explain, "[e]xact measures and computations
 9 of . . . damages will require expert analysis and testimony," and Consumer Plaintiffs "intend to
 10 provide an expert report on damages" consistent with the Court's schedule for expert discovery.

11 **Advertiser Plaintiffs' Position:** On Friday, August 20, 2021, at 3:40 p.m., Facebook
 12 emailed Plaintiffs a four-page letter demanding that Plaintiffs amend their initial disclosures by
 13 Tuesday, August 24, 2021. Facebook's demand for a response from Plaintiffs in two business days
 14 is unreasonable.³ In any event, the issue is not ripe for decision at this case management conference.
 15 Advertiser Plaintiffs have agreed to supplement their disclosures under Fed. R. Civ. P. 26(a)(1)(A)(i)
 16 and (iii) by August 27.

17 Advertiser Plaintiffs allege that their damages arise from overcharges paid to Facebook for
 18 advertising on Facebook's social network. The information and sales data Advertiser Plaintiffs'
 19 experts will use to calculate damages is in the possession of Facebook and has not yet been produced,
 20 notwithstanding Facebook's obligations under Fed. R. Civ. P. 26(a)(1)(A)(ii). Advertiser Plaintiffs'
 21 experts will analyze the amounts Facebook charged class members for social advertising during the
 22 damages class period.

23

24 ³ Facebook's own conduct demonstrates this. On the same day that Facebook made this
 25 request, Plaintiffs submitted a request to Facebook for an unredacted version of the Amended FTC
 26 Complaint. Whereas Facebook's letter demanded a response in two business days (which Plaintiffs
 27 provided), Facebook has not, until today, even acknowledged Plaintiffs' request, today claiming for
 28 the first time in Section 6, *supra*, that it requires more time. To the extent Facebook seeks more
 time for this and similar requests, Plaintiffs are happy to evaluate those requests. But Plaintiffs
 should be afforded the same courtesy, rather than having their responses be unilaterally demanded
 by Facebook.

1 Advertiser Plaintiffs bring claims under Sections 1 and 2 of the Sherman Act and are seeking
 2 damages arising from the alleged monopolist and conspirator, Facebook, imposing higher
 3 advertising costs than would be charged in a competitive market. Advertiser Plaintiffs' damages
 4 theory is widely accepted and can be expressed in simplified form as: [Dollar Overcharge = (Pm –
 5 Pc) x Qm] where Pm is the price charged for advertising, Pc is the but-for or competitive price
 6 charged for advertising, and Qm is the quantity of advertising sold by Facebook to class members
 7 during the class period.⁴ Once the necessary discovery from Facebook is completed and the
 8 necessary information and data are disclosed, Advertiser Plaintiffs anticipate that their damages
 9 experts will use various econometric tools including, *inter alia*, multivariate regressions to articulate
 10 a class-wide formula for computing damages.

11 Facebook's demand for preliminary estimates of class wide damages at this time is
 12 overreaching and premature. *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, No. 02 C
 13 5893, 2004 WL 2108410, at *2 (N.D. Ill. Sept. 21, 2004) ("It is unreasonable for defendants to
 14 expect the exact damages formula from initial disclosures . . . where expert analysis is undoubtedly
 15 necessary. . . . Defendants have received the basic information – they know plaintiffs' general
 16 theory of damages (and likely should have known the theory without a written submission).")
 17 Facebook has not provided class wide sales data, let alone data pertaining to each class member,
 18 and its demand comes five months prior to the due date for class certification expert reports and
 19 over a year prior to merits expert reports. Dkt. 115 at 2 (class certification motion due March 15,
 20 2022, and opening expert reports due September 23, 2022). Expert disclosure of damages formula
 21 and calculations are governed by Fed. R. Civ. P. 26(a)(1)(A)(2) and are generally made concurrently
 22 or in conjunction with motions pursuant to Fed. R. Civ. P. 23 and Fed. R. Civ. P. 56. As a result,
 23 there will likely be serial supplementation of Plaintiffs' damages calculations pursuant to Fed. R.
 24 Civ. P. 26(e) and Fed. R. Civ. P. 26(a)(1)(A)(2)(e).

25 Finally, Facebook's claim that Plaintiffs' initial disclosures somehow threaten the viability
 26 of the case schedule set by the Court—purportedly “by inhibiting Facebook's ability to proceed with
 27

28 ⁴ John Connor, *Price-Fixing Overcharges: Revised 3rd Edition*, SSRN, at 7 (2014),
<https://dx.doi.org/10.2139/ssrn.2400780>.

1 . . . targeted discovery of the named Plaintiffs”—is clearly belied by its service of 41 expansive
 2 requests for production on Plaintiffs today.

3 **f. Discovery Propounded to Date**

4 On August 25, 2021, Facebook served Requests for Production of Documents on the named
 5 User Plaintiffs and named Advertiser Plaintiffs that seek to test the validity of various assertions in
 6 the CACs.

7 **Plaintiffs’ Position:** Less than fifteen minutes before Facebook’s “final edits” to this Joint
 8 Case Management Statement were due under the parties’ agreement (but which Facebook did not
 9 timely provide), Facebook served requests for production on Plaintiffs. Given the timing between
 10 Facebook’s service of those requests and the filing of this Joint Case Management Statement,
 11 Plaintiffs are continuing to evaluate Facebook’s requests and reserve all rights to object or otherwise
 12 respond to those requests.

13 **Facebook’s Position:** It is unclear what the Plaintiffs are complaining about here—
 14 Facebook’s service of written discovery has no bearing on the timing of the Case Management
 15 Conference Statement or the parties’ respective positions. Facebook served discovery. Facebook
 16 then updated the draft statement, which includes a summary of discovery to date, to state that fact.
 17 Plaintiffs do not need to “reserve” a right to serve objections or “otherwise respond” to the requests.
 18 Plaintiffs must respond or object to the requests within 30 days after service, as the Federal Rules
 19 require.

20 **g. Close of Fact and Expert Discovery**

21 The July CMO set September 2, 2022, as the fact discovery cut-off, and November 4, 2022,
 22 as the expert discovery cut-off. Dkt. No. 115 at 2.

23 **5. Related Cases**

24 **Plaintiffs’ Position:**

25 Plaintiffs do not have any related cases to bring to the Court’s attention.⁵ See Standing Order

26
 27 ⁵ Judge Freeman determined that these cases are not “related” to *Reveal Chat*. See *Reveal*
 28 *Chat Holdco LLC et al v. Facebook, Inc.*, Case No. 5:20-cv-00363-BLF (N.D. Cal. Jan. 21, 2021),
 Dkt. 110.

1 for All Judges of the Northern District of California, cl. 10 (https://www.cand.uscourts.gov/wp-content/uploads/judges/Standing_Order_All_Judges_11.1.2018.pdf). As indicated *infra*, Plaintiffs
 2 take no position as to the pending motion to relate *Loveland*.
 3

4 **Advertiser Plaintiffs' Position:** Advertiser Plaintiffs reserve all rights to oppose any future
 5 motion to centralize Advertiser Plaintiffs' claims with the MDL pending in the Southern District of
 6 New York.
 7

Facebook's Position:

8 Facebook has moved to relate the amended complaint in *Loveland v. Facebook, Inc.*, No.
 9 21-CV-03300-CRB (transferred to N.D. Cal on May 4, 2021), to this case. Dkt. No. 131.
 10

11 After Judge Freeman dismissed their entire case on statute of limitations and laches grounds,
 12 plaintiffs in *Reveal Chat Holdco LLC v. Facebook, Inc.*, No. 5:20-cv-00363-BLF, filed a notice of
 13 appeal on May 6, 2021. Dkt. No. 117. Plaintiffs filed their opening brief on August 23, 2021.
 14 *Reveal Chat Holdco LLC v. Facebook, Inc.*, No. 21-15863, Dkt. No. 18. Facebook will file its
 15 answering brief by October 25, 2021. *See id.* Dkt. No. 22.

16 On July 29, 2021, the Judicial Panel on Multidistrict Litigation (JPML) held a hearing on
 17 Google's petition to centralize several lawsuits against Google and Facebook (or Google alone)
 18 alleging that one or both companies monopolized or suppressed competition in advertising-
 19 technology related markets, including by entering into an agreement in September 2018 known as
 20 the Google Network Bidding Agreement (GNBA). The GNBA forms the basis of the Advertiser
 21 Plaintiffs' claim under Section 1 of the Sherman Act. On August 10, 2021, the JPML ordered the
 22 actions transferred to the Southern District of New York, assigning them to Judge P. Kevin Castel
 23 as *In re: Google Digital Advertising Antitrust Litigation*, MDL No. 3010. Dkt. No. 126. Facebook
 24 will evaluate next steps concerning the MDL following the Court's ruling on the motion to dismiss
 25 the Advertisers' case.

6. Lawsuits Filed by FTC and State Attorneys General

26 On June 28, 2021, Judge Boasberg issued opinions dismissing the antitrust complaints filed
 27 by the Federal Trade Commission ("FTC") and the Attorneys General of multiple states. *See Fed.*
 28 *Trade Comm'n v. Facebook, Inc.*, No. 20-cv-03590-JEB, 2021 WL 2643627 (D.D.C. June 28, 2021);

1 *New York v. Facebook, Inc.*, No. 20-cv-03589-JEB, 2021 WL 2643724 (D.D.C. June 28, 2021). On
 2 July 28, 2021, the States filed a notice of their intent to appeal Judge Boasberg's decision to the
 3 D.C. Circuit. 1:20-cv-03589, Dkt. 138. On August 19, 2021, the FTC filed an amended complaint.
 4 *Fed. Trade Comm'n*, 1:20-cv-03590, Dkt. No. 75 ("FTC Complaint").

5 **Plaintiffs' Position:** The FTC Complaint contains redactions because portions of the
 6 unredacted complaint contain information that Facebook has designated as confidential. On August
 7 20, 2021, Plaintiffs requested that Facebook provide Plaintiffs with an entirely unredacted version
 8 of the FTC Complaint, or, at a minimum, a version that does not contain redactions of information
 9 that Facebook has designated confidential. Facebook has not responded to Plaintiffs' request.

10 **Consumer Plaintiffs' Position:** As anticipated by Plaintiffs, the FTC's amended complaint
 11 includes new and additional allegations regarding Facebook's alleged monopoly power, explaining
 12 why other particular online services are not "social networks," and citing to the same metrics that
 13 Plaintiffs allege competition authorities and Facebook itself have used to measure market share (e.g.,
 14 "time spent" by users). *Compare* FTC Complaint, ¶¶ 43, 175, 189, 192–93, 198, 202, *with Klein*
 15 Dkt. No. 87, ¶¶ 65, 77–78, 163–65, 262, 286, *and Klein* Dkt. No. 116 at 3.

16 **Facebook's Position:** A case management statement is not the appropriate place for a
 17 nonparty to give an endorsement of someone else's lawsuit. Facebook will respond to the amended
 18 complaint filed by the FTC on October 4, 2021 per the order entered by Judge Boasberg. *See* FTC
 19 Case, Minute Order (July 23, 2021) (setting schedule). Should Facebook renew its motion to
 20 dismiss, briefing will be complete by December 1, 2021. *Id.* As for Plaintiffs' request for an
 21 unredacted version of the FTC Complaint, Plaintiffs made the request just a couple of days ago and
 22 Facebook will promptly respond.

23 **7. Updates Regarding ADR**

24 The parties agreed, at the time they filed the March 31, 2021 and June 30, 2021 Case
 25 Management Statements, that ADR would not be constructive at that time. The parties continue to
 26 believe that ADR would not be constructive at this time but may be willing to engage in ADR with
 27 a private mediator as these actions progress.

28

1 **8. Other Matters**

2 The parties' respective positions as to a protocol for future joint case management statements
3 are set forth below.

4 **Facebook's Position:**

5 Facebook respectfully requests that the Court enter a protocol for the drafting and exchange
6 of drafts of future joint case management statements. During the drafting process for each of the
7 three joint case management statements submitted to this Court, Plaintiffs have set deadlines they
8 have then proceeded to ignore, have refused to allow Facebook appropriate time to respond to their
9 edits to drafts in progress, and have engaged in gamesmanship through last minute substantive edits
10 to the statements hours before filing.⁶ To address these recurring issues, Facebook requests that the
11 Court order the below schedule to be followed for all future joint case management statements:

- 12 • **12 pm Pacific, 5 business days before filing:** Plaintiffs provide a draft joint case
13 management statement to Facebook.
- 14 • **12 pm Pacific, 2 business days before filing:** Facebook provides its response to
15 Plaintiffs' draft joint case management statement.
- 16 • **12 pm Pacific, 1 business day before filing:** Plaintiffs provide revisions to draft
17 joint case management statement.

18

19

20 ⁶ Plaintiffs mischaracterize the parties' agreement as to this particular joint case management
21 statement. Facebook never agreed to provide "final edits" to Plaintiffs by 12 pm Pacific on the day
22 of filing; instead, Facebook agreed to provide its revisions to Plaintiffs' previous draft, at which
23 point *the parties* would make final edits and prepare for filing. In any case, Facebook's addition of
24 "636 words and 5 case citations" was in response to Plaintiffs' revisions in the previous draft as well
25 as subsequent events (including User Plaintiffs' amended initial disclosures and Advertiser
26 Plaintiffs' responsive letter, both of which Facebook received only the day before) and made
27 pursuant to the process agreed to by the parties. Plaintiffs' suggestion that Facebook should not
28 update the submission to the Court to reflect subsequent events and ensure that the Court has an up-
to-date recitation of the joined issues as the parties' discussion evolved makes little sense. Indeed,
this is precisely the back-and-forth to ventilate positions and join issues for the Court that is
contemplated in preparation for the joint submission. If Plaintiffs' concern is timing, that concern
is precisely the concern that Facebook has raised and that Facebook's proposal is intended to
address. And if Plaintiffs genuinely desire to have more time for the parties to consider one
another's positions, Plaintiffs would not propose to compress the time for preparation of the
statement as they have done here.

1 • **12 pm Pacific, day of filing:** Facebook provides revisions to draft joint case
 2 management statement.

3 • **Before midnight, day of filing:** The parties will work to make final edits and file
 4 the joint case management statement.

5 Facebook respectfully submits that the above schedule puts both sides in the best position to fairly
 6 and efficiently arrive at a joint submission that will facilitate the Court's management of the case.

7 By contrast, Plaintiffs' proposals will only hamper the fair exchange of positions and
 8 prejudice Facebook. At the outset, Plaintiffs' position that they should not have to provide a draft
 9 5 business days (one week) before the statement is due makes little sense—there is no reason that
 10 Plaintiffs cannot provide a preliminary draft of the joint case management statement a week before
 11 the statement is due, especially where Facebook's proposal provides ample opportunity for Plaintiffs
 12 to continue to revise the statement in response to Facebook's positions and as the parties work to
 13 finalize it. On the flip side, Plaintiffs' proposal would be highly prejudicial to Facebook because it
 14 would have Plaintiffs providing their positions to Facebook on Friday at 12 pm Pacific / 3 pm
 15 Eastern and require Facebook to respond by 12 pm Pacific / 3 pm Eastern on Monday, depriving
 16 Facebook's outside and in-house counsel a reasonable opportunity to prepare their responsive
 17 sections.

18 Likewise, Plaintiffs' proposal that the parties should exchange simultaneous drafts will only
 19 hinder the efficient preparation of the joint submission. The parties have not previously exchanged
 20 joint case management statement drafts simultaneously and it does not make sense to do so going
 21 forward. Plaintiffs' proposal would only lead to greater inefficiency because it invites submissions
 22 that are ships passing in the night and will make it harder for the parties to join issues on which the
 23 Court's guidance is needed. Instead, Facebook's proposal provides ample opportunity for both sides
 24 to consider one another's proposals and try to narrow or resolve issues to provide a truly joint
 25 submission. That said, if the Court determines that the simultaneous exchange of drafts is
 26 preferable, Facebook requests that the Court order the below schedule to be followed for all future
 27 joint case management statements to correct the imbalances in Plaintiffs' proposal and to ensure that

1 there is a reasonable period for Facebook to prepare its positions (i.e., does not require Facebook to
 2 prepare its sections between Friday afternoon and Monday afternoon):

- 3 • **12 pm Pacific, 5 business days before filing:** Plaintiffs provide a draft outline of a
 4 joint case management statement to Facebook, identifying Plaintiffs' anticipated
 5 topics, headings, and joint positions including an identification of the specific issues
 6 or topics to be addressed.
- 7 • **12 pm Pacific, 2 business days before filing:** The parties simultaneously exchange
 8 their position statements for the joint case management statement. If Facebook has
 9 identified other topics to raise in the joint case management statement that were not
 10 in Plaintiffs' draft outline, Facebook will identify those topics and provide its
 11 position statement on the topics.
- 12 • **12 pm Pacific, 1 calendar day before filing:** The parties simultaneously exchange
 13 a further round of responsive edits, including Plaintiffs' position statements on the
 14 topics identified by Facebook in the previous draft.
- 15 • **12 pm Pacific, day of filing:** The parties simultaneously exchange a further round
 16 of responsive edits.
- 17 • **Before midnight, day of filing:** The parties will work to make final edits and file
 18 the joint case management statement.

19 **Plaintiffs' Position:**

20 Plaintiffs believe the parties should themselves be able to negotiate briefing schedules for
 21 all joint submissions to the Court, as the parties have done to date. In the interests of avoiding
 22 unnecessary disputes, Plaintiffs have repeatedly accommodated Facebook's proposed schedules or
 23 negotiated compromise ones, despite Facebook's unilateral taking of more time than provided for
 24 under the parties' agreed-upon schedules (including for this Joint Case Management Statement) and
 25 despite Facebook's raising new substantive issues and positions for the first time as part of its "final
 26 edits" to submissions (including this one).

27 To the extent the Court determines that a universal briefing schedule that would apply to
 28 future joint case management statements would be helpful for the parties (absent agreement of the

1 parties or Court order as to any one particular statement), Plaintiffs would welcome that guidance.
2 To ensure fairness to all parties and to minimize the back-and-forth from Plaintiffs sending their
3 proposed inserts on a Friday, Facebook providing its responsive inserts on Monday, and so on,
4 Plaintiffs propose:⁷

- 5 1. Plaintiffs provide to Facebook a draft outline of a statement at 12:00 p.m. PST on the
- 6 Friday before the Wednesday that a joint case management statement is due. This
- 7 draft would identify all anticipated topics, headings, and joint positions but leave
- 8 blank all position statements.
- 9 2. The parties simultaneously exchange their position statements for the joint case
- 10 management statement at 12:00 p.m. PST on the Monday before the Wednesday that
- 11 a joint case management statement is due.
- 12 3. The parties simultaneously exchange one further round of responsive edits at 12:00
- 13 p.m. PST on the day (Wednesday) the joint case management statement is due. These
- 14 edits would be limited to those which directly address points in the original position
- 15 statements. Absent agreement of the parties, no party is allowed further substantive
- 16 revisions after this exchange.
- 17 4. The parties file the joint case management statement on the Wednesday that joint
- 18 case management statement is due.

19 The simultaneous exchange of drafts (and Plaintiffs' proposed timing) is consistent with the
20 protocols entered in other class action cases (including those litigated by counsel in this case) and
21 at least one pending against Facebook. *See, e.g., In re Facebook, Inc. Consumer Privacy User*
22 *Profile Litig.*, Case No. 3:18-md-02843-VC (N.D. Cal.) (Corley, J.), Dkts. 404 at 2, 420 at 2
23 (requiring parties to "exchange their portions of the joint submissions by noon two days before the
24 status conference"). Facebook's conduct in preparing this statement (and others) highlights the need
25 for simultaneous exchanges. Facebook's "final edits"—to which it insisted Plaintiffs could make

7 N.D. Cal. Civil L.R. 16-10(d) requires the parties to submit joint case management
statements seven days before the Court holds joint case management conferences. This Court
holds those conferences on Wednesdays.

1 “only non-substantive edits”—added 636 words and 5 case citations to the initial disclosure section
2 alone. Allowing one party to unilaterally change its position after seeing the others’ is prejudicial.

3 Were the Court inclined to adopt Facebook’s proposal for staggered exchanges, Plaintiffs
4 would propose that the Court implement such a schedule based on “calendar” days, rather than
5 “business” days. For previous submissions (including this one), Plaintiffs have agreed to provide
6 their proposed inserts to Facebook on the Friday before the Wednesday that joint case management
7 statements have been due, so long as Facebook provides its responsive inserts on the following
8 Monday. Facebook’s proposal to tie Plaintiffs’ exchange to “business” days would require Plaintiffs
9 to provide their initial statements of drafts on the Wednesday before the Wednesday that joint case
10 management statements are due, which is one week before the Court holds case management
11 conferences. Put differently, using “business days” would require Plaintiffs to submit initial drafts
12 to Facebook one week before the joint statement is due and two weeks before the Court normally
13 holds case management conferences. Facebook, by contrast, would then be able to, for the first
14 time, provide its responsive positions five calendar days later (the following Monday).

15 As to Facebook’s alternative proposal for a simultaneous exchange, Facebook’s proposal
16 would give Facebook five calendar days to prepare its positions on the topics that Plaintiffs have
17 identified, but would give Plaintiffs only one calendar day to prepare its positions on the topics that
18 Facebook has identified. If anything, fairness dictates that the parties should simultaneously
19 exchange, in the first instance, the topics that the parties propose be included in the joint case
20 management statement. Moreover, Plaintiffs respectfully submit that the parties need not exchange
21 (as Facebook proposes) four rounds of substantive edits, including three rounds of simultaneous
22 exchanges. The goal of subsequent case management statements is to “report[] progress or changes
23 since the last statement was filed and mak[e] proposals for the remainder of the case development
24 process.” N.D. Cal. Civil L.R. 16-10(d). Rather than furthering this purpose, Facebook’s proposal
25 would unnecessarily complicate (not simplify) the substance of, and process for, these statements.

26

27

28

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1 **ATTESTATION OF KRISTEN M. ANDERSON**

2 This document is being filed through the Electronic Case Filing (ECF) system by attorney
3 Kristen M. Anderson. By her signature, Ms. Anderson attests that she has obtained concurrence in
4 the filing of this document from each of the attorneys identified on the caption page and in the above
5 signature block.

6 Dated: August 25, 2021

7 By /s/ Kristen M. Anderson

8 Kristen M. Anderson

9 **CERTIFICATE OF SERVICE**

10 I hereby certify that on this 25th day of August 2021, I electronically transmitted the
11 foregoing document to the Clerk's Office using the CM/ECF System, causing the document to be
12 electronically served on all attorneys of record.

13 By /s/ Kristen M. Anderson

14 Kristen M. Anderson